JUN 10 2010

No. 09-1246

IN THE

Supreme Court of the United States

ROSE DESIA,
Trustee of the BARBARA BESS TRUST,

Petitioner,

v.

GENWORTH LIFE AND ANNUITY
INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The Parent Company of Genworth Life and Insurance Company ("Genworth"), f/k/a General Electric Capital Assurance Company ("GELAAC"), is Genworth Financial, Inc. No publicly traded company owns 10% or more of Genworth's stock.

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STATEMENT OF THE CASE

Petitioner appeals from a Memorandum Of Decision (the "Decision") issued by the Connecticut District Court, Hon. Mark R. Kravitz presiding, granting summary judgment in favor of General Electric Annuity and Assurance Company n/k/a Genworth Life and Annuity Insurance Company ("Genworth"), which Decision was affirmed by the summary order (the "Order") of the United States Court of Appeals for the Second Circuit.

Petitioner misstates the basis on which the lower courts granted the motion for summary judgment and then affirmed the Decision. Petitioner states that the lower courts relied on a witness' credibility to "extinguish genuine issues of material fact." The Second Circuit, however, affirmed that Respondent had met its burden to show that no genuine issue of material fact existed that would permit a reasonable jury to return a verdict for Petitioner and that Petitioner then failed to meet her burden to adduce affirmative evidence sufficient to defeat the motion. The Second Circuit also properly held that in light of all the evidence proffered by Respondent in support of its motion, Petitioner's general attack on the credibility of a witness, even if believed, was insufficient to provide evidence that would permit a jury to find for Petitioner.

Respondent respectfully requests that the judgment of the Second Circuit be affirmed.

BACKGROUND

This petition is the latest — and should be the last — attempt by Petitioner to take advantage of an inadvertent mistake and try to use that error to create a windfall for Petitioner, even though that result would fly in the face of the facts, the law and common sense.

The Order affirmed the dismissal of a claim for breach of contract by Petitioner Rose Desia, as Trustee of the Barbara Bess Trust, f/b/o Julius Solomon ("Desia" and "the Solomon Trust," respectively). Desia alleged that the Solomon Trust was the third-party beneficiary of two annuity contracts (the "Genworth Annuities"), owned by decedent Dr. Barbara Bess ("Bess") and issued by Genworth and that Genworth breached those contracts by paying their proceeds to Bess' sisters, Marilyn Bess-Bennett ("Bennett") and Betsy Palozzi ("Palozzi"), rather than to the Solomon Trust.

The petition alleges that the lower courts determined that it was Bess' intent that her sisters be the beneficiaries of the Genworth Annuities and resolved genuine issues of material fact "relying solely on the strength" of a witness' credibility. Petition at p. 18. This is untrue. The Second Circuit, viewing all of the evidence in the record in the light most favorable to Desia, concluded that Genworth had presented sufficient evidence to establish that Bess intended the beneficiaries of the Genworth Annuities to be her sisters, and not the Solomon Trust. (*See* Order, App. 5a and JA 400-401)[1]. Genworth had thus met its burden of

1. The letters "App." refer to the appendix attached to the petition and "JA" refer to the parties' "Joint Appendix" filed with the Second Circuit.

showing that there was no genuine issue as to any material fact that would permit a reasonable jury to return a verdict for Desia.

Even after the completion of extensive discovery,[2] Desia was not able to present documentary or testimonial evidence to contradict Genworth's showing. Decision, App. 18a. Instead, Desia merely attacked the credibility of a witness on collateral issues. As the lower courts held, such an attack was insufficient to defeat Genworth's motion.

Desia principally argues that the District Court (i) ignored material facts from which a jury could have drawn an inference that Bess intended that the Genworth Annuities benefit her friend, Julius Solomon ("Solomon"), the beneficiary of the Solomon Trust, and (ii) resolved credibility issues in favor of a witness, James Stewart ("Stewart"), Bess' former financial adviser at A.G. Edwards and Sons ("AGE"). The Second Circuit properly rejected these arguments.

It is undisputed that Bess' sisters were the original beneficiaries of the Genworth Annuities and Desia presented no evidence to show that Bess intended to change the beneficiaries to the Solomon Trust. Pursuant to an estate plan developed by Bess' attorney, Bess signed change of beneficiary forms for the Genworth Annuities. Stewart testified that they were blank when

2. Petitioner alleges that the motion for summary judgment was filed "after some discovery." In fact, discovery, including the taking of eight (8) depositions, had been completed prior to the filing of the parties' motions for summary judgment.

Bess signed them and this evidence is "uncontradicted." Decision, App. 17a. Neither Solomon nor Desia, both of whom claimed to have been present with Bess on the day she signed the forms, saw any writing on the forms other than Bess' signature. Thus, Stewart's testimony that he took the blank forms and later entered the words "Barbara Bess Trust" to mean another trust established for Bess, and not the Solomon Trust, is undisputed.[3]

Both Genworth and Petitioner agree that it is Bess' intent, not that of any other person, that governs the issue of entitlement to the Genworth Annuities. App. 13a. Genworth produced evidence showing that Bess intended her sisters to be the beneficiaries of the Genworth Annuities. App. 15-16a. In the face of such evidence, the lower courts concluded that Petitioner's evidence that Bess made brief and ambiguous comments to Petitioner on the day she signed the foregoing forms in blank, in the context of the undisputed facts presented, did not create a genuine issue of material fact with respect to Bess' intent. Order, 3a; Decision, App. 18a.

Desia's assertion that in granting the motion the District Court improperly determined that Stewart's testimony was credible also lacks any merit. As the

3. Petitioner alleges that at her deposition, Desia testified that the forms were not blank when Bess signed them. Petition at page 10, para. 1. This allegation is untrue. In fact, Desia testified that she did not see what was written on the forms and Solomon testified that he was not present when they were signed. (JA 404, p. 11; AA 189-190, pp. 11-12.) The letters "AA" refer to the Appellee's Appendix filed with the Second Circuit.

Second Circuit held, the District Court "carefully and accurately" detailed the evidence in the record below to determine that Genworth had demonstrated Bess' intent that the Genworth Annuities benefit her sisters through documents and witnesses other than Stewart. In light of this evidence, the issue of Stewart's credibility is a "red herring." Although credibility determinations usually are jury functions, a plaintiff may not defeat a properly-supported motion for summary judgment solely with general or collateral attacks on a witness' credibility. Rather, a plaintiff must offer affirmative, concrete evidence that demonstrates genuine issues of material fact. This Desia did not do. Order, App. 3a.

Genworth met its burden to initially demonstrate the absence of a genuine issue of material fact and properly supported its motion for summary judgment. Desia, however, then failed to meet her burden to identify affirmative evidence from which a jury could find that Bess ever intended to deprive her sisters of the assets in the Genworth Annuities. Instead, Desia simply responds with general attacks upon a defendant's credibility. None of the points raised in Petitioner's attacks on the credibility of Stewart's evidence, however, are germane to the central issue in this case: Bess' intent with respect to the Genworth Annuities.

Desia asserts that the lower courts "distorted" the "Rule 56 procedure" and should have denied Genworth's motion in order to permit a jury to review Stewart's testimony. If Petitioner were to prevail, however, any non-moving party could defeat a summary judgment motion by simply stating that there were credibility issues with a witness' testimony, effectively rendering

Rule 56 meaningless. The Decision was, in fact, consistent with the intent of Rule 56: to permit trial only when there are genuine issues of material fact that would permit a reasonable jury to return a verdict for the non moving party and to eliminate those frivolous claims that have no factual basis.

STATEMENT OF FACTS

(i) Bess Maintained Accounts At A.G. Edwards

In 1993, Bess opened securities accounts with AGE, for which Stewart was the financial adviser. (*See* JA 280, Stewart Tr. 20-21.)[4] During the mid 1990s, Bess purchased a total of seven annuity contracts through Stewart and AGE (the "Annuities"), including the two Genworth Annuities in issue in this case. (JA 151, ¶ 3.) The joint beneficiaries of both Genworth Annuities were Bess' sisters, Bennett and Palozzi. (JA 151, at ¶4 and 8.)

Solomon was the sole beneficiary of three of the Annuities. These Annuities were issued by AIG Ovation, Nationwide Best of America and American Legacy II Lincoln. (JA 390, Saviano Tr. 640.) (*See also* JA 151, ¶6.) When Bess died, Solomon received the proceeds of these three Annuities which were worth in excess of $1 million before estate taxes. (*See* AA 6). The beneficiaries of the remaining annuities, issued by American Legacy II and Nationwide Fidelity Advisor, were Bennett and Palozzi jointly, and Bess' nephew, Christopher Couture ("Couture"), respectively. (JA 151, ¶¶ 7-8.)

4 The letters "Tr." refer to the deposition transcripts of various witnesses.

(ii) Bess Created Two Trusts Pursuant to Her Estate Plan And Neither Trust Was Called The "Barbara Bess Trust"

In 1998, Bess decided to create an estate plan and consulted a tax lawyer, Saviano. (JA 362-363 and 365, Saviano Tr. pp. 7, 10 and 23-24.) From mid-1998 through August 1999, Saviano helped Bess to develop such a plan. (JA 384, Saviano Tr. 534). As part of the estate plan, Saviano created a will and two trusts. (JA 370, Saviano Tr. 89). Bennett, Palozzi and Couture were the residual beneficiaries of Bess' will. Neither of the trusts was titled the "Barbara Bess Trust." (JA 39, ¶¶ 2-3) Rather, the trusts were named as follows:

(a) **Trust u/a Barbara Bess dated December __ 1998 f/b/o Julius Solomon** (the "Solomon Trust"). *See* copy of the agreement creating the Solomon Trust (the "Solomon Trust Agreement") at page 3, Section F. (JA 199.)

(b) **Barbara Bess Charitable Remainder Unitrust** (the "Unitrust"). (*See* copy of the agreement creating the Unitrust (the "Unitrust Agreement") at page 3, Section D. (JA 72.)

The purpose of the Solomon Trust was to create an entity that Bess would fund with annual tax-free gifts up to the maximum exclusion ($10,000 per beneficiary) permitted under I.R.S. rules. This structure would enable Solomon to receive the assets in the Solomon Trust free of gift and estate tax after Bess' death.

(JA 379-380, Saviano Tr. 276-278). Desia was the trustee of the Solomon Trust. (JA 227, Desia Tr. 51.)

The purpose of the Unitrust was to create an entity that would be exempt from income tax and give its beneficiaries the best "economic value" of the assets that Bess left to them after her death. (AA 178, Saviano Tr. 101). The beneficiaries of the Unitrust were Bess' remaining blood relatives, her sisters Bennett and Palozzi, and Bess' nephew, Couture. (*See* JA 72, Section H; JA 371, Saviano Tr. 102). Couture and A.G. Edwards Trust Co. ("AGE Trust") were named the co-trustees of the Unitrust. (*See* JA 83, Section A.) The Unitrust was to be funded by changing the beneficiaries of Bess' qualified, i.e., retirement, accounts, savings and annuities to her Estate and then when she died, the funds would pour into the Unitrust. (JA 371, Saviano Tr.102).

(iii) Bess Agreed To Change The Beneficiaries Of All Her Qualified Savings To Her Estate

On or about July 27 1999, Saviano recommended, and Bess agreed, that Bess should change the beneficiaries of her qualified savings to her Estate. No changes were to be made to the beneficiaries of her non-qualified holdings. Bess instructed Saviano to tell "Stewart what to do on her death beneficiary designations." (JA 366-367 and JA 386, Saviano Tr. 29-30 and 610). More specifically, she asked Saviano to send a letter to Stewart to "make sure it was done right." (JA 387, Saviano Tr. 612).

There was no discussion at that time, or any other time, about changing the beneficiaries of the Genworth Annuities, or any of Bess's other Annuities, to the Solomon Trust. (JA 386, Saviano Tr. 609-610). To the contrary, Bess and Saviano had discussed "capping" the already substantial amount that Solomon was to receive upon her death. (JA 386, Saviano Tr. 608). Bess said that, if and when the value of the Solomon Trust had increased to equal the value of one of the Annuities of which Solomon was a beneficiary, Bess would change the beneficiary of that Annuity to her sisters. (JA 386, Saviano Tr. 608).

One of the Genworth Annuities was qualified and one was non-qualified. (*See* JA 151, ¶¶ 4-5.) Thus, pursuant to Bess' instructions, as reflected in Saviano's letter, the only change that was intended with respect to those investments was to the beneficiary of the qualified annuity, which should have been changed to Bess' Estate.

Following the discussion between Bess and Saviano about changing certain of her beneficiaries, on July 28 1999, Saviano sent a letter to Stewart, instructing him to change the beneficiaries on Bess' "qualified retirement savings" to the Estate of Barbara Bess. (JA 386, Saviano Tr. 611). (*See also* JA 107.) Saviano sent a copy of that letter to Bess. Bess did not respond to the letter or otherwise tell Saviano that anything in the letter was incorrect.

Stewart does not recall reviewing Saviano's letter at or about the time that it was received at his office in late July or early August 1999. (JA 285, Stewart Tr. 45).

Nevertheless, by early August 1999, Stewart had learned that Bess had completed her planning for the Estate. (JA 151, ¶10). Bess spoke with Stewart on the phone and told him that the names of beneficiaries of Annuities were to be changed to be "consistent" with her new estate plan. (JA 303, Stewart Tr. 225).

(iv) Bess Signed The Change Of Beneficiary Forms In Blank And Told Stewart To Speak To Saviano About The Beneficiaries To Insert

On Sunday, August 15, 1999, Stewart visited Bess at her house in Connecticut to have her sign change of beneficiary forms for the Annuities. (JA 152, ¶11). Solomon was present at Bess' residence on that day. (*See* AA 67, Solomon Tr. 228). Desia alleges that she also was present.[5] (*See* JA 230, Desia Tr. 104.)

Stewart mistakenly understood that the beneficiaries of all of the Annuities – not just the qualified Annuities — were to be changed, but he was unsure which should be changed to the Estate and which to the Unitrust. (JA 152, ¶13.) Although Stewart had attempted to reach Saviano to clarify these issues, he had not spoken to him. (JA 295, Stewart Tr. 173). As a result, Stewart took blank change of beneficiary forms for all of the Annuities, both qualified and non-qualified, to Bess' home and presented them to her for signature.

Bess signed the blank forms for all her Annuities, including the Genworth Annuities. (JA 152, ¶11). Bess

5. Stewart testified that Desia was not in the kitchen when Bess signed the beneficiary forms, but she may have been upstairs. (JA 306 and 308, Stewart Tr. 234-236 and 253.)

told Stewart to speak to Saviano to find out which beneficiaries needed to be changed and to whom. (JA 304, Stewart Tr. 226). Contrary to the allegations in the petition, Solomon and Desia admit that they did not see any reference to the "Barbara Bess Trust," or any other writing besides Bess' signature, on the change of beneficiary forms for the Genworth Annuities. (*See* AA 189, at p. 11, Point II; AA 70, Solomon Tr. 238.)

(v) Bess' Purported Question Whether Desia Had To Sign The Forms

Desia alleges that after Bess signed the beneficiary forms on August 15, 1999, ". . . as an afterthought, [Bess] said, Jimmy [Stewart], doesn't Rosie have to sign the forms since she's the trustee?" and Stewart replied, "No." (JA 350, Desia Tr. 119.) Stewart denies that exchange took place, and Solomon testified that he never heard the purported discussion. (JA 289, Stewart Tr. 80; AA 70-71, Solomon Tr. 240 243.) Desia further alleges that after Stewart and Solomon had left the room, Bess said "I don't understand why you don't have to sign these forms. You are the trustee." (JA 274, Desia Tr. 106.)

(vi) Desia's Actions Show That She Never Believed That Bess' Purported Question Reflected Any Intent To Make The Solomon Trust The Beneficiary Of The Genworth Annuities

As of August 1999, Bess had never discussed her Estate Plan with either Desia or Solomon. (*See* AA 189, Point II, JA 233, Desia Tr. 124-125 and JA 233, Solomon Tr. at 66.) More specifically, Bess had never discussed

the Genworth Annuities with either Desia or Solomon, and neither Desia nor Solomon had any prior knowledge that Bess was planning to make any change to the beneficiaries of one of those Annuities. (*See* AA 189, at p. 11, Point II and AA 72, Solomon Tr. 247-248.) Bess never told Desia or Solomon that the Solomon Trust was, or would become, the beneficiary of one or both of the Genworth Annuities. (*See* AA 189, at p. 11, Point II; AA 26, Solomon Tr. 65; JA 233, Desia Tr. 124-125.)

Moreover, Desia's actions after Bess' death confirm that she did not take Bess' purported question as any indication whatsoever that Bess intended to make the Solomon Trust the beneficiary of one or both of the Genworth Annuities. Desia was the trustee of the Solomon Trust and the fiduciary of that trust. However, between August 1999 and June 2003, although Desia spoke with her cousin Solomon two or three times a day, she never even discussed the Genworth Annuities with Solomon. (*See* AA 189-190 at p. 11-12; JA 226-228, Desia Tr. 49-50, 56.) As trustee of the Solomon Trust, Desia received monthly account statements from AGE for an account maintained by the Solomon Trust. (JA 270-272.) Although the Genworth Annuities did not appear on those statements at any time, Desia did not contact Genworth or AGE to ask about the proceeds of the Genworth Annuities. (AA 189-190; JA 235, Desia Tr. 265. In fact, Desia testified that, after Bess died in 1999, Desia made no effort to find out happened to the proceeds of the Genworth Annuities until 2003.

Thus, for nearly four years after Bess' death, Desia did not take a single step to see whether the Solomon Trust had been named the beneficiary of one or both of

those Annuities, or had received the proceeds therefrom. (JA 229, Desia Tr. 61.)

(vii) Bess' Death And Stewart's Mistaken Completion Of The Change Of Beneficiary Forms

On August 26, 1999, Bess died. (AA 31, Solomon Tr. 82). Upon learning of Bess' death, Stewart "was in shock" at the loss of his close friend. He then realized, in a panic, that he had not yet completed the change of beneficiary forms that Bess had signed in blank or sent them to Genworth and the other companies that had issued the Annuities. (JA 152, ¶12-13; JA 299, Stewart Tr. 187-188).[6]

That afternoon, Stewart completed the forms, changing the names of the beneficiaries on each of the Annuities, including the non-qualified Annuities, to either the "Barbara Bess Estate" or the "Barbara Bess Trust." (JA 152, ¶13). When he mistakenly wrote the "Barbara Bess Trust" on certain of the forms – even though Saviano/Bess had not instructed that any of the beneficiaries be so changed — Stewart intended to reference the Unitrust, of which Bennett, Palozzi and Couture were the beneficiaries. (JA 309-310, Stewart Tr. 313-314). Neither Bess, Saviano nor anyone else had ever told Stewart that there was any plan to change the beneficiaries of any of the Annuities to the Solomon Trust, and Stewart did not intend those words to refer

6. Desia alleges that Bess signed two Genworth Beneficiary Forms but Stewart submitted only one form to Genworth which requested that both of the Genworth Annuities be changed. (*See* JA 97.)

to the Solomon Trust. (JA 310, Stewart Tr. 314-315). In any event, because the only change to the Genworth Annuities that Bess had directed was the change of the beneficiary of the qualified Annuity from Bennett and Palozzi to Bess's Estate, both of Stewart's changes were mistakes.

On August 26, 1999, Stewart faxed the change of beneficiary forms to Genworth and the other companies that had issued Bess' Annuities (the "Annuity Companies"). (JA 286, Stewart Tr. 46; JA 152, ¶13). After he had submitted the change of beneficiary forms to the Annuity Companies, Stewart later checked his file for Bess, found Saviano's letter dated July 28, 1999 and realized his errors. (JA 286, Stewart Tr. 46). Stewart was especially concerned that, if the Annuity Companies changed the beneficiaries, as per the change of beneficiary forms, Solomon, who was the beneficiary of three Annuities worth more than $1 million, would not receive those assets. (JA 288, Stewart Tr. 60).

When he realized his errors, Stewart called Genworth and the other Annuity Companies and tried to cancel the instructions on the change of beneficiary forms. (JA 286, Stewart Tr. 46-48). Genworth refused to change the beneficiaries on its Annuities back to Bess' sisters.[7] (*Id.* at JA 286, pp 46-48). Stewart also called Saviano and informed him of the errors. (JA 385, Saviano Tr. 553-555).

7. Only one of the Annuity Companies, AIG, agreed to accept Stewart's telephonic request to change the beneficiary on the annuity back to the original beneficiary. (JA 286, Stewart Tr. 47-48).

(viii) Saviano, Not Stewart, Coordinated The Effort To Request That Genworth Change The Beneficiaries From The Unitrust Back To Bess' Sisters

After Stewart had reported his errors to Saviano and made his initial calls to the Annuity Companies, Saviano instructed that Stewart to do nothing further until Saviano reviewed the matter. (JA 385, Saviano Tr. 554). Saviano also told Stewart that he would undertake to try to correct the errors. (JA 385, Saviano Tr. 554.)

In the meantime, because Bess had died prematurely, Saviano determined that the Unitrust did not qualify, as intended, as a "charitable remainder unitrust" pursuant to I.R.S. regulations. Accordingly, Saviano voided the Unitrust. The voiding of the Unitrust eliminated the tax advantage that would have been realized from changing the beneficiaries of the qualified Annuities to the Estate. (JA 378, Saviano Tr. 230 231).

Saviano's firm then sent letters to Genworth and the other Annuity Companies, requesting that they change the beneficiaries back to the original beneficiaries. (JA 368, Saviano Tr. 63-65). With these letters, Saviano also sent a copy of an affidavit that had been prepared for Stewart (the "Stewart Aff.") which explained the facts leading up to the changes in the beneficiaries of the Annuities, and an affidavit from Couture, the Executor of Bess' Estate.

(ix) Genworth Properly Paid The Annuities To Palozzi and Bennett

At Saviano's request, Genworth agreed to treat the original beneficiaries as the rightful recipients of the proceeds of the Annuities. (JA 392-393, Saviano Tr. 707-708; AA 200) After much work and effort, Saviano's actions persuaded Genworth to change the beneficiaries back to Bess's sisters. (JA 392-393, Saviano Tr. 707-709; AA 200, ¶2.)

The other Annuity Companies also agreed to reinstate the original beneficiaries of Bess' other annuities. Solomon – who had been mistakenly removed as the beneficiary of three other annuities worth more than $1 million due to Stewart's errors – was restored as beneficiary pursuant to that process.

In April 2000, pursuant to the terms of the annuity contracts, Genworth transferred the assets in the Genworth Annuities to Bennett and Palozzi. Each sister received 50% of the net proceeds of the Genworth Annuities, after estate taxes.

Neither Saviano nor Stewart contacted Desia regarding the transfer of the assets in the Genworth Annuities because Desia was not the trustee of the Unitrust and Bess had never advised Stewart or Saviano of any intention that the Genworth Annuities be transferred to the Solomon Trust.

(x) The District Court Granted Genworth's Motion for Summary Judgment

After the completion of discovery, Genworth moved for summary judgment (the "Motion") against Plaintiff. On October 24, 2008, District Judge Mark R. Kravitz granted Genworth's Motion and dismissed the complaint. (JA 401, p. 7.)

The District Court concluded that, resolving all ambiguities and drawing all inferences in favor of the non-movant Desia, Genworth had met its burden of showing that there was no genuine issue as to any material fact and was therefore entitled to summary judgment as a matter of law. (JA 400-401, pp. 7-8.)

The District Court noted that both parties relied upon *Bigley v. Pacific Standard Life Insurance Company*, 229 Conn. 459 (1994) in support of their arguments. Although the parties disagreed about the application of *Bigley* to the instant case, they agreed that *Bigley* was "controlling" and stands for the proposition that it is "the intent of the policy holder that governs the question of who is the rightful beneficiary." (*Id.* at JA 401, p. 8.) The Court stated that Genworth had presented evidence to show that Bess intended the beneficiary of the Genworth Annuities to be her sisters, who actually received the proceeds of the two Genworth Annuities. (*Id.* at JA 401, p. 8.) Further, taking all of the evidence in the record in the light most favorable to Desia, the Court found that she had not presented any evidence to the contrary. (*Id.* at JA 401, p. 8.)

(xi) The District Court Dismissed Plaintiff's Allegations Concerning the Credibility of Stewart

The District Court stated that Desia's arguments concerning the credibility of Stewart's testimony did not warrant denying summary judgment, especially since Desia had raised no genuine disputed issue of material fact supporting her theory of the case. (*Id.* at JA 405, p. 12.)

The District Court also found that the evidence presented by Genworth, including the testimony of Desia and Solomon, that the annuity forms were blank on the date that Bess signed them was "uncontradicted." Decision, App. 19a. Stewart testified that they were blank, Solomon testified that he was not present when they were signed and Desia testified that she did not see what was written on the forms. *Id.*

Desia also states that certain documents contained the words "Barbara Bess Trust," which means the Solomon Trust. However, each of the documents referenced by Desia includes additional qualifying language, such as "f/b/o Julius Solomon," specifically identifying that the document referred to the Solomon Trust. None of the Exhibits identified by Desia referred to the Solomon Trust by the words "Barbara Bess Trust" alone.[8] *See* Decision, App. 30a.

8. In addition, one document was produced in discovery that refers to the Unitrust as the "Barbara Bess Trust." On May 8 2000, David Tobias, Saviano's partner who also worked on the Estate Plan, wrote a letter regarding one of Bess' other Annuities to Lincoln National Life Insurance Company in which referred to the "Barbara Bess Trust" as a shorthand for the Unitrust, not the Solomon Trust. (JA 391, Saviano Tr. 70.)

(xii) The Second Circuit Affirmed the Decision

On October 28, 2009, the United States Court of Appeals for the Second Circuit, reviewing the award for summary judgment *de novo*, affirmed the Decision (Order, App. 1a) The court held that the record was replete with "uncontradicted evidence" that Bess completed the change of beneficiary forms in accordance with her Estate Plan. App. 3a. Bess' estate plan, as developed by Saviano, never anticipated that the Genworth Annuities would be transferred to the Solomon Trust.

The Second Circuit stated that the sole piece of evidence that Desia proffered to support her claim was Desia's own uncorroborated testimony that Bess asked Desia whether Desia had to sign the change of beneficiary form. The Second Circuit affirmed the District Court's holding that this alleged statement raised no triable issue of fact because a jury would be forced to "engage in impermissible speculation to infer from this single enquiry that Bess intended her annuities to be paid to Julius Solomon." Order, App. 3a.

The Second Circuit also addressed the issue of Desia's allegations regarding Stewart's credibility. The Court stated that the attacks on Stewart's credibility, "even if credited," provided no evidence to permit a reasonable jury to find that Bess intended to designate the Solomon Trust as the beneficiary of her Genworth Annuities. *Id.*

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DETERMINED THAT UNDISPUTED FACTS SHOWED THAT GENWORTH HAD PAID THE ANNUITIES TO THE BENEFICIARIES INTENDED BY BESS AND THEREFORE DESIA'S CONTRACT CLAIM MUST BE DISMISSED

(i) A District Court Should Grant a Motion for Summary Judgment As a Matter of Law Where There Exist No Genuine Issues of Material Fact that Would Permit a Reasonable Jury to Find for the Non-Movant

A motion for summary judgment should be granted as a matter of law where the moving party has proved that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ P. 56(c). A dispute regarding a material fact is only "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 587 (1986). A court must grant a motion for summary judgment, if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The substantive law governing the case will identify those facts that are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the

entry of summary judgment." *Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 59 (2d Cir. 2006).

The party moving for summary judgment is initially responsible for demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323; *Holcomb v. Iona College*, 521 F.3d 130, 137 (2d Cir. 2008). Then the onus shifts to the party resisting summary judgment to present evidence sufficient to satisfy every element of her claim. *Id.* at 137; Fed. R. Civ. P. 56. Once the movant has met its burden, the non-movant may not rest on mere allegations of a dispute of material fact. As set forth in Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Thus, the non-movant must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586. She must come forward with "specific facts showing that there is a *genuine issue for trial.*" *Id.* at 587, (emphasis in original). If the evidence put forward by the non-movant is merely "colorable," the motion should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249-50.

(ii) Genworth Met Its Burden to Show that There Were No Issues of Material Fact Concerning The Issue of Whether Bess' Sisters Were The Rightful Beneficiaries Of The Annuities

As Desia agrees, the intent of the policyholder governs the question of the identity of the rightful beneficiary and, if a carrier pays the rightful beneficiary, there can be no liability. App. 13a, *citing Bigley v. Pacific Standard Life Insurance Co.*, 229 Conn. 459, 463-464 (1994). The District Court properly determined that Genworth had presented facts that showed it paid the proceeds of the Genworth Annuities to the beneficiaries intended by Bess: her sisters Bennett and Palozzi.

As set forth above, there were two Genworth Annuities, one qualified and one non-qualified. Pursuant to the Estate Plan that Saviano created for Bess, Bess intended that the beneficiary of the qualified annuity, as well as Bess' other qualified holdings, be changed to her Estate. No changes were to be made to the beneficiaries of the non-qualified Genworth Annuity or any of Bess' other non-qualified holdings. No beneficiary was to be changed to the Solomon Trust.

Bess told Saviano to make sure that Stewart "knew what to do on her death beneficiary designations." Saviano then sent Stewart a letter, which he copied to Bess, stating "it is important that the death beneficiary of all qualified retirement savings are her estate." Bess did not correct or object to anything in the letter and that letter did not mention the Solomon Trust.

When Stewart presented Bess with blank change of beneficiary forms, and Bess signed those forms, Bess said "make sure you talk to [Saviano] to find out, you know, where the -- where these annuities – which annuities and who are the beneficiaries supposed to be changed to."

Based upon the foregoing undisputed facts, irrespective of Stewart's mistakes, the District Court properly determined that Bess intended that the beneficiaries of the non-qualified Genworth Annuity should always have been Bennett and Palozzi. The beneficiary of the qualified Genworth Annuity initially should have been changed to the Estate, of which Bennett and Palozzi were beneficiaries. Because the sole reason for changing beneficiaries on the Annuities to the Estate was to fund the Unitrust and the Unitrust ultimately did not qualify under I.R.S. rules, the Unitrust was voided. The original beneficiaries, Bennett and Palozzi, who Bess had always intended to be beneficiaries of the Genworth Annuities, were then reinstated. Under any circumstances, these facts provided no basis for any reasonable inference that Bess intended to change the beneficiary of either Genworth Annuity to the Solomon Trust.

Thus, the District Court correctly found that, by paying the proceeds of the Genworth Annuities to Palozzi and Bennett, and not to the Solomon Trust, Genworth complied with Bess' intent.

(iii) Desia Failed to Meet Her Burden to Raise a Genuine Issue of Material Fact Once the Court Determined that Bess' Sisters Were The Rightful Beneficiaries Of The Annuities

As the District Court correctly found, Desia did not present evidence sufficient to satisfy every element of her claim. In support of the petition, Desia argues that that the District Court disregarded material facts showing that (i) the change of beneficiary forms for the Genworth Annuities were not blank when Bess signed them, but rather that a jury might infer that the forms indicated that the beneficiaries were being changed to the Solomon Trust, (Petition page 10), (ii) that defendants created documents using the term "Barbara Bess Trust" as a shorthand for the Solomon Trust, *Id.* and (iii) Bess allegedly asked whether Desia, the trustee of the Solomon Trust, needed to sign the change of beneficiary forms. *Id.*

As the District Court found, the evidence, including the testimony of Desia and Solomon, that the forms were blank was "uncontradicted." Decision, App. 17a. In the face of such evidence, Desia's allegation that it was not Bess' general "practice" to sign documents in blank, nor typical of her general "hands-on" approach to her Estate, is not sufficient to create a genuine issue of material fact with respect to the contents of these particular forms. (JA 404, p. 11.) As explained above, efforts to concoct "some metaphysical doubt as to the material facts" are insufficient to defeat summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. at 586.

Desia also argues that because certain documents relating to the Solomon Trust, presented as Exhibits A through F to the Reply Memorandum in the District Court (the "Reply Memorandum") (AA 204-220), contain the words "Barbara Bess Trust," this indicates somehow that Stewart intended the words "Barbara Bess Trust" to mean the "Solomon Trust." Petition p.10. As the District Court correctly determined, however, even if that were true, Bess' intent governs and Stewart's understanding of the term is irrelevant. (JA 403-404, pp. 10-11).

In any event, Desia's allegation with regard to these documents is misleading because no document uses only the words "Barbara Bess Trust" in reference to the Solomon Trust. Each of the documents cited by Petitioner uses additional qualifying language, such as "f/b/o Julius Solomon," specifically identifying that the trust referenced in the document as the Solomon Trust. As the Decision noted, none of the documents referenced by Petitioner identify the Solomon Trust by the words "Barbara Bess Trust" alone. (*See* Decision, App.30a, note 8.)

The District Court also correctly determined that Bess' purported question concerning whether Desia should sign the change of beneficiary forms for the Genworth Annuities did not create a genuine issue of fact as to Bess' intent concerning the beneficiaries of those annuities. (JA 404-405, pp. 11-12.)

A non-movant cannot defeat a motion for summary judgment simply by arguing that questions relating to a person's "intent" create a genuine issue of fact. "Mere

incantation of intent or state of mind does not defeat otherwise valid summary judgment." *Citizens Bank of Clearwater v. Hunt*, 927 F.2d 707, 711 (2d Cir. 1991), *citing Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985). The summary judgment rule would be rendered "sterile" if a simple statement that there is an issue concerning a person's "intent or state of mind" operated as a "talisman to defeat an otherwise valid motion." *Meiri v. Dacon*, 759 F.2d at 998.

As stated above, the undisputed evidence is that Bess and Saviano agreed that only the beneficiaries of the qualified annuities would be changed to Bess' Estate. Moreover, although Desia was the sole Trustee and fiduciary of the Solomon Trust and she spoke to Solomon daily, for more than three years after Bess died, Desia never made any attempt to discover whether the Solomon Trust had received the assets from the Genworth Annuities. Thus Bess' alleged remark to Desia did not cause Desia to raise the issue with Solomon or to question why the Genworth Annuities never appeared on the Solomon Trust account statements she was receiving from AGE. (JA 233-234, Desia Tr. 125-128.)

In light of the foregoing, the District Court correctly found that, drawing all inferences in favor of Desia, her bare, uncorroborated allegation that Bess asked a question about whether Desia should sign the change of beneficiary forms is insufficient to raise a genuine issue of material fact that would permit a reasonable jury to find that Bess intended to change the beneficiary of the annuities from her sisters to the Solomon Trust. *See Citizens Bank of Clearwater*, 927 F.2d at 711.

POINT II

DESIA'S ARGUMENTS CONCERNING STEWART'S CREDIBILITY DO NOT RAISE A GENUINE ISSUE OF MATERIAL FACT

Once a defendant has made a properly supported motion for summary judgment, the plaintiff may not overcome such a motion with general attacks upon a person's credibility. *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998). A non-movant may not "defeat a motion for summary judgment" by relying "on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible." *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996); *McCullogh v. Wyndach Union Free Sch. Dist.*, 187 F.3d 272, 280 (2d Cir. 1999).

If the most that can be hoped for is the "discrediting of defendants' denials at trial no question of material facts is presented." *Modern Homes Inst., Inc., v. Hartford Accident Indem. Co.*, 513 F.2d 102, 110 (2d Cir. 1975). A plaintiff may not "defeat a defendant's properly supported motion for summary judgment" without "offering any concrete evidence from which a reasonable jury could return a verdict" in plaintiff's favor, by merely asserting that the jury might disbelieve the defendant and without offering "any significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256-7. Rather, a non-movant must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive. *Crawford-El v. Britton*, 523 U.S. at 600; *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972).

Broad, conclusory attacks on the credibility of a witness will not, by themselves, present questions of material fact. *Island Software & Computer Service, Inc. v. Microsoft Corp.* 413 F.3d 257, 261 (2d Cir. 2005), *citing Crawford-El v. Britton*, 523 U.S. at 600. Once the movant has supported a motion, the non-moving party may not simply rest on the hope of discrediting the movant's evidence at trial. *United States v. Real Property*, 480 F.3d 841, 844 (8th Cir. 2007).

Summary judgment is "particularly appropriate where, notwithstanding issues of credibility, the nonmoving party has presented no evidence or inferences that would allow a reasonable mind to rule in its favor; in this situation, it may be said that the record as a whole points in one direction and the dispute is not genuine." *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 130 (3d Cir. 1998).

The petition alleges that in determining that it was Bess' intent that her sisters be the beneficiaries of the Genworth Annuities the lower courts "rel[ied] solely on the credibility of Stewart." Petition at pg. 18. This allegation has no merit. As the District Court determined, Genworth had presented evidence sufficient to show that there was no genuine issue as to any material fact that would permit a reasonable jury to find that it was not Bess' intent to bequeath the Genworth Annuities to her sisters. As Petitioner presented no evidence to contradict this determination, as a matter of law, she can not defeat the motion by attacking a witness' testimony on issues collateral to the intent of Bess.

The evidence presented by Genworth demonstrated that Bess intended that Bennett and Palozzi – and not the Solomon Trust — receive the Genworth Annuities. This was established through sources other than Stewart. Those sources include (i) Saviano's undisputed testimony concerning (a) his discussion with Bess about changing the beneficiaries of certain of her annuities to her Estate, (b) Bess' directive that Saviano inform Stewart of those changes and (c) the fact that Saviano and Bess never discussed changing the beneficiaries of the Genworth Annuities, or any other annuities, to the Solomon Trust; (ii) Saviano's letter to Stewart, which was copied to Bess, confirming that certain beneficiaries were to be changed to her Estate (and not to the Solomon Trust); (iii) admissions by Desia and Solomon that they never discussed with Bess any plan to make the Solomon Trust the beneficiary of the Genworth Annuities or any other annuities; (iv) admissions by Desia and Solomon that they saw no language on the change of beneficiary forms that Bess signed other than Bess' signatures; and (v) the fact that, for more than three years after Bess' death, Desia never took a single step to check whether the Solomon Trust had received the Genworth Annuities, as Desia purportedly expected.

Because the facts establish Genworth's entitlement to summary judgment through sources independent of Stewart's testimony, the Second Circuit properly found that allegations concerning Stewart's testimony could not possibly warrant reversal of the District Court's decision.

Desia's primary argument concerning credibility is based upon alleged inconsistencies between the facts stated in the Stewart Affidavit and his deposition testimony, which Stewart characterized as "embellishments."[9] (App. Br. 30-32). Those inconsistencies, however, were "minor and immaterial to the central issues in the case," i.e., Bess' intent with respect to the beneficiaries of the Genworth Annuities, and they do not amount to "falsehoods that call [Stewart's] testimony about Dr. Bess' intent into question." (JA 409-410, pp. 16-17.) Moreover, there is no support for Desia's conclusion that that these inconsistencies regarding collateral issues were intentional misstatements.

Finally, Petitioner's argument that Stewart may have colluded with Saviano is unsupported by a single document or any other evidence. As stated above, a plaintiff may not defeat a defendant's properly supported motion for summary judgment without "offering any concrete evidence from which a reasonable jury could return a verdict" in plaintiff's favor, by merely asserting that the jury might disbelieve the defendant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256-7. Because Desia presented no evidence to support her "conspiracy" theory, the theory has no bearing on Stewart's credibility.

9. Stewart did not write the affidavit which was prepared for his signature by AGE. (JA 294, Stewart Tr. 146.) Moreover, when Plaintiff asked what Stewart meant by the word "embellishments" Stewart stated that "in retrospect" he had concerns about how the affidavit was "worded." (JA 292, Stewart Tr. 134.).

CONCLUSION

Respondent Genworth respectfully requests that the judgment of the Second Circuit be affirmed.

Respectfully submitted,

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